INDIRECT ENCROACHMENT ON FEDERAL AUTHORITY BY THE TAXING POWERS OF THE STATES.[1] V

II. Regulations of Interstate Commerce (*continued*)

2. *Taxes not Discriminating against Interstate Commerce* (continued)

B. Taxes on Property

REFERENCE has already been made to the cases which treat franchises as property and consider the assessment of such franchises by the criteria which obtain in judging whether taxes on property are regulations of interstate commerce.[2] This indicates that there is no hard and fast line to be drawn between privileges and property. When a franchise may be disposed of for a price, it is of course a form of property. Conversely, all property is to an extent a matter of privilege. The remedies for interference with property interests are essential to the security and salability of those interests. In so far as the remedies are the creation of the law, and are subject to amendment or withdrawal, the interests which the remedies serve partake of the nature of privilege, and taxes on those interests might by a chain of reasoning be deemed taxes on privileges.

The pursuit of these fascinating possibilities will be left to those who care to indulge in it. It is enough for our present purpose to disclaim any assumption of perfection or of inherent validity in the schematism here employed. The topical headings and their order of treatment are chosen solely from considerations of convenience. Though privilege and property are not mutually exclusive categories, horses and land and ties and rails are different from corporate franchises and the right to inherit. Roughly speaking, taxes on property may be distinguished from taxes on privileges, even though the two share some common because of vicinage.

[1] For preceding instalments of this discussion see 31 Harv. L. Rev. 321–72 (January, 1918), *Ibid.*, 572–618 (February, 1918), *Ibid.*, 721–78 (March, 1918) and *Ibid.*, 932–53 (May, 1918).

[2] 31 Harv. L. Rev. 768, note 166.

This common has already been pointed out in discussing taxes on privileges,[3] and there will be occasion to refer to it again. It is also to be borne in mind that no exercise of state fiscal power can adequately be judged in isolation. The legitimacy of any particular demand may depend upon the presence or absence of some other or others. But threads must first be spun before they can be woven together. If any misapprehensions are permitted or fostered by the effort to disentangle in analysis what is interrelated in practice, they will, it is hoped, be dispelled by a later venture in synthesis.

The taxes on property here to be considered do not include those levied on the property that is carried in interstate commerce and offered for sale after reaching its destination. Such taxes, with the exception of those which in some fashion discriminate against interstate commerce,[4] are not treated as instances of indirect encroachment on the realm of federal control. Property in interstate transit[5] and property that has completed its journey[6] present the issue of taxability rather than that of valuation. What we are here concerned with are the taxes which are confessedly on proper subjects of state power, but which are assessed in ways that are alleged to exceed that power. The issue is whether the subject or the method of assessment shall be regarded as controlling. The property taxes which raise this issue are those on property which is an instrument of interstate commerce, whether peripatetic like cars and engines or immobile like ties and track. When property of an intangible character intrudes itself into the discussion, it is because the Supreme Court has chosen to make a classification for which it must bear the responsibility.

I

On December 15, 1873, in *Union Pacific R. R. Co.* v. *Peniston*,[7] a majority of the Supreme Court rejected the contention that the property of the Union Pacific was exempt from state taxation on account of the relation of the road to the federal government.

[3] 31 HARV. L. REV. 768, note 166.

[4] See 31 HARV. L. REV. 572–74.

[5] See editorial note in 26 HARV. L. REV. 358–60.

[6] Brown *v.* Houston, 114 U. S. 622, 5 Sup. Ct. Rep. 109 (1885).

[7] 18 Wall. (U. S.) 5 (1873). See 31 HARV. L. REV. 371, note 171.

Three dissenting justices, however, argued that the property itself was an agency of the United States, and was therefore as immune from state taxation as are the bonds of the United States or the operations of the United States Bank. Less than three months later, in *The Delaware Railroad Tax*,[8] Mr. Justice Field indicated without objection from any of his colleagues that a state tax on the property of an interstate carrier was not a regulation of interstate commerce. From that day forward it has never been seriously doubted that a tax on tangible property used as an instrument of interstate commerce is not a tax on that commerce.[9] Such disputes as we have here to chronicle relate to the propriety of methods adopted for assessing that property.

Mr. Justice Field's remarks about property taxation in *The Delaware Railroad Tax* [10] must be regarded as *obiter*, since he had previously stated that the tax before the court was not a tax on property, but one "upon the corporation itself, measured by a percentage upon the cash value of a certain proportional part of the shares of its capital stock." [11] It is to be inferred that the tax, if one on property, would have been held to be faulty because of the method by which the amount of property in Delaware was determined. The statute required each company subject to the act to pay a tax of one-fourth of one per cent on such proportion of the cash value of all its shares as the length of the line in Delaware bore to the total mileage. It was conceded that the "ratio of the value of the property in Delaware to the value of the whole property of the company" was considerably "less than that which the length of the road in Delaware bears to its entire length." [12] From this Mr. Justice Field concluded that "a tax imposed upon the property in Delaware according to the ratio of the length of its road to the length of the whole road must necessarily fall on property without the State," [13] and observed that, upon the assump-

[8] 18 Wall. (U. S.) 206 (1873).

[9] In 1891 Mr. Justice Gray on page 23 of his opinion in the Pullman case, note 33, *infra*, declared: "It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction."

[10] Note 8, *supra*.

[11] 18 Wall. (U. S.) 206, 231 (1873).

[12] *Ibid.*, 230.

[13] *Ibid.*, 231.

tion that the tax was on property, there would be great difficulty in sustaining it.

The tax was therefore regarded as one "upon the corporation itself," which seems to mean upon the right to exist as a corporation. It was sustained on the theory that the state has absolute power over its own corporate creatures. After saying that "the State may impose taxes upon the corporation as an entity existing under its laws, as well upon the capital stock of the corporation or its separate corporate property," [14] Mr. Justice Field added that "the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion." [15] In view of the previous indication that the caprice of the state would have been curbed, had the tax been one on property, this imputation to the state of arbitrary power must be confined to the assessment of the franchise. But the suggested limitation on the power to tax property is predicated, not on the commerce clause, but on the position that the state must confine its exactions to property within the jurisdiction.

The two closing paragraphs of the opinion dismiss the objections under the commerce clause. That the conclusion is not confined to taxes on the franchise is manifest from the final sentence:

"*The exercise of the authority* which every State possesses *to tax* its corporations and *all their property, real and personal,* and their franchises, and to graduate the tax upon the corporations *according to* their business or income, or *the value of their property,* when this is not done by discriminating against rights held in other States, and the tax is not on imports, exports, or tonnage or transportation to other States, *cannot be regarded as conflicting with any constitutional power of Congress.*" [16]

The tax in question was said to affect commerce among the states "just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed." [17] And Mr. Justice Field, though he had dissented in *State Tax on Railway Gross Receipts*,[18] decided twelve months earlier, quotes with approval from the opinion in that case to the effect that "it is not everything that affects com-

[14] 18 Wall. (U. S.) 231 (1873).
[15] *Ibid.*
[16] *Ibid.*, 232. Italics are author's.
[17] *Ibid.*
[18] 15 Wall. (U. S.) 284 (1872). See 31 HARV. L. REV. 576–77.

merce that amounts to a regulation of it, within the meaning of the Constitution."[19]

Of course the majority judges in the Gross Receipts case could find no fault with taxing property employed in interstate commerce. That case, it will be remembered, sustained a tax levied directly on gross receipts. One of the grounds adduced by the majority was that the receipts were a fund actually in the hands of the corporation, disassociated from the source whence they were derived. The artificiality of this conception was exposed by the minority at the time, and fourteen years later was recognized by a unanimous court.[20] But while the doctrine prevailed, there could be no doubt that a state might effectively tax interstate commerce, provided it was careful not to impose the tax formally on the commerce itself. It is significant, however, that the judges who dissented in *State Tax on Railway Gross Receipts*[21] interposed no objection to the statement in *The Delaware Railroad Tax*[22] that the property of an interstate carrier was taxable at its full value. The only qualification suggested was that this value must not be inflated by the inclusion of elements not local to the taxing state. It seemed to be assumed that the valuation could take the form of a capitalization of earnings, including those from interstate commerce, for the value of the entire road was fixed by the cash value of the shares of capital, which would of course be determined in large measure by some estimate of earnings.

Three years later, in the *State Railroad Tax Cases*,[23] the propriety of this mode of assessment was distinctly affirmed, so far as the Fourteenth Amendment was concerned. Mr. Justice Miller pointed out that "the visible or tangible property of the corporation . . . may or may not include all its wealth."[24] "There may be other property of a class not visible or tangible which ought to respond to taxation, and which the State has a right to subject to taxation."[25] And the method of assessment adopted by Illinois was indicated and approved as follows:

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[19] 15 Wall. (U. S.) 293 (1872); quoted in 18 Wall. (U. S.) 206, 232 (1873).

[20] Philadelphia & Southern Mail S. S. Co. *v.* Pennsylvania, 122 U. S. 326, 7 Sup. Ct. Rep. 1118 (1887).

[21] Note 18, *supra*.

[22] Note 8, *supra*.

[23] 92 U. S. 575 (1876).

[24] *Ibid.*, 602.

[25] *Ibid.*

"It is therefore obvious that, when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock." [26]

The *State Railroad Tax Cases* [27] did not involve interstate commerce,[28] since the complainants rested their objections wholly on other grounds. Not until twelve years later did the commerce question come again before the court. It was then decided in *Western Union Telegraph Co.* v. *Massachusetts* [29] that it was not a regulation of interstate commerce to assess the property of an interstate telegraph company by taking that proportion of the assessable value of the total capital stock which the miles of line within the state bore to the total miles of line. Mr. Justice Miller distinctly stated that the tax was not one on the franchise of the company, which interpretation seemed to be necessary to save the tax from being one on a federal instrumentality. "The tax in the present case," he said, "though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts." [30] Inasmuch as the assessable value of the total capital stock was based on the market value of the outstanding shares, the assessment necessarily took account of earnings. This is evident from *Massachusetts* v. *Western Union Telegraph Co.*,[31] a later case between the same parties involving subsequent taxes levied under the same statute. For there it appeared that the company "admitted its liability to pay a tax on the actual value, as stated in its answer, of its real and personal property within the

[26] 92 U. S. 605 (1876).

[27] Note 23, *supra*.

[28] For other cases sustaining the application of the so-called "unit rule" or some modification thereof, when interstate commerce was not involved, see Kentucky Railroad Tax Cases, 115 U. S. 321, 6 Sup. Ct. Rep. 57 (1885), Marye *v.* Baltimore & Ohio R. Co., 127 U. S. 117, 8 Sup. Ct. Rep. 1037 (1888), Charlotte C. & A. R. Co. *v.* Gibbes, 142 U. S. 386, 12 Sup. Ct. Rep. 255 (1892), and Columbus Southern Ry. Co. *v.* Wright, 151 U. S. 470, 14 Sup. Ct. Rep. 396 (1894).

[29] 125 U. S. 530, 8 Sup. Ct. Rep. 961 (1888).

[30] *Ibid.*, 530, 552.

[31] 141 U. S. 40, 11 Sup. Ct. Rep. 889 (1891).

State," [32] and paid into court the sum so admitted to be due, which was less than that held rightfully demanded under the statute.

On the same day the court also decided *Pullman's Palace Car Co.* v. *Pennsylvania*,[33] which sanctioned Pennsylvania's method of taxing the cars that ran in and out of the state during the year. Most of the discussion in both the majority and minority opinions was concerned with the question whether the cars had a taxable situs in the state. The minority insisted that, since no specific cars were permanently located there, no cars were taxable. But the majority held it proper to estimate the average number of cars and to tax such car property, even though no single car stayed still long enough to give it a situs within the state. The tax purported to be based on a portion of the capital stock, but the court treated it as substantially one on the cars as property.

Surprisingly little was said about the method of assessment, which is described in the majority opinion as follows:

"The mode which the State of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run." [34]

Then follows the approving comment:

"This was a just and equitable method of assessment; and, if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more." [35]

The validity of this method of assessment was said to have been established by the *State Railroad Tax Cases* [36] and *Western Union Telegraph Co.* v. *Massachusetts*.[37] But the former case raised no question under the commerce clause, and in the latter the only attention given to the method of assessment was to ascertain whether the state had correctly determined the proportion of the

[32] 141 U. S. 40, 45, 11 Sup. Ct. Rep. 889 (1891).
[33] 141 U. S. 18, 11 Sup. Ct. Rep. 876 (1891).
[34] *Ibid.*, 18, 26.
[35] *Ibid.*
[36] Note 23, *supra*.
[37] Note 29, *supra*.

total property located in Massachusetts. The fact that the valuation took account of earnings from interstate commerce was neglected.

It is also neglected in the Pullman case. Mr. Justice Gray's opinion for the majority notes that the company had about one hundred cars in the state all the time, but does not suggest that the value of that number of cars might readily be estimated without adopting a method that reaches the business as well as the property of the company. Nor do the minority protest on this point. True, Mr. Justice Bradley questions whether a proper method of apportionment has been adopted, and shows that, since Illinois, the state in which the corporation was chartered, might tax it on the value of its total capital stock, the supposed equitable quality of the tax discovered by the majority depends upon an assumption not likely to be true. But this protest is one against inequitable and double taxation, and is not tied up to the commerce clause. Yet this tax had a more direct effect on interstate commerce than those previously considered, for its amount varied more directly with receipts. Under several of the Pennsylvania statutes the taxes on the Pullman Company were measured directly by dividends; under another they were measured by dividends when the dividends were six per cent or more on the par value of the capital, and by a valuation of the capital when the dividends were less. But the opinions do not refer to the fact that the result of Pennsylvania's method was to reap income from the interstate commerce in which the cars were engaged, in excess of a levy on the value of the cars as independent chattels.

Seven months later, however, in *Maine* v. *Grand Trunk Ry. Co.*,[38] the subject receives more direct attention. This case has already been considered in the section dealing with taxes on privileges,[39] but it has a bearing on the present topic on account of the interpretation subsequently put upon it.[40] The majority sustained a tax measured by gross receipts estimated to have been earned from business within the state, on the ground that the subject taxed was a privilege over which the state had complete control and which it

[38] 142 U. S. 217, 12 Sup. Ct. Rep. 121 (1891).

[39] 31 HARV. L. REV. 579–80.

[40] See Galveston, H. & S. A. Ry. Co. *v.* Texas, 210 U. S. 217, 226, 28 Sup. Ct. Rep. 638 (1908).

might therefore burden as it pleased. The minority, consisting of Justices Bradley, Harlan, Lamar, and Brown, insisted that the tax, though called one on the franchise, was in fact one "on the receipts of the company derived from international transportation."[41] Justices Bradley and Harlan had dissented in the Pullman case, in which Mr. Justice Brown had not sat, having been appointed to the bench after the case had been argued; but Mr. Justice Lamar had concurred in that case and also in *Western Union Telegraph Co.* v. *Massachusetts*,[42] in which Mr. Justice Harlan was with him. Mr. Justice Bradley for some reason did not sit in the Western Union case, but he was on the bench when *The Delaware Railroad Tax*[43] was decided by a unanimous court. It seems, then, that the dissent in the Grand Trunk case is to be attributed, not so much to long-standing convictions, as to a new recognition of the problem.

Mr. Justice Bradley's dissent in the Grand Trunk case starts with the position that, "whilst the purpose of the law professes to be to lay a tax upon the foreign company for the privilege of exercising its franchise in the State of Maine, the mode of doing this is unconstitutional."[44] The learned justice here seems to look behind the subject taxed, and to attach controlling significance to the measure by which the amount of the tax is determined — an enterprise which the court had hitherto regarded as beyond its province.[45] He insists that the nominal subject is not the actual subject. "The tax, it is true, is called a tax on a franchise. It is so called, but what is it in fact? It is a tax on the receipts of the company derived from international transportation."[46] And the cases then adduced as precedents against its constitutionality are those in which the *res* named as the subject of taxation included the business of interstate commerce, or receipts therefrom. Had the majority taken the same view of what was being taxed, they would undoubtedly have agreed that the tax was unconstitutional. But they accepted the state's declaration of what it was taxing, and thought that a tax on a privilege that the state might with-

[41] 142 U. S. 217, 235, 12 Sup. Ct. Rep. 121 (1891).
[42] Note 29, *supra*.
[43] Note 8, *supra*.
[44] 142 U. S. 217, 231, 12 Sup. Ct. Rep. 121 (1891).
[45] See 31 HARV. L. REV. 334 *ff*.
[46] 142 U. S. 217, 235, 12 Sup. Ct. Rep. 121 (1891).

hold could not be a regulation of interstate commerce, no matter how it was measured.

Mr. Justice Bradley's position that the measure by which the amount of the tax is determined is the controlling test of what is actually being taxed is of course as applicable to taxes nominally on property as to those nominally on privileges. Indeed, since there has never been ascription to the state of arbitrary power over property, there is more reason for scrutinizing assessments of property than assessments of franchises. Mr. Justice Bradley does not seem to make any distinction between the two. Yet it is possible that his objections are leveled chiefly against the cumulation of taxes in fact measured by the contributions of interstate commerce, and that he would have acquiesced in the solution of the vexed problem that the Supreme Court at the present time seems to be working towards.

The learned justice concludes his opinion as follows:

"Then it comes to this: A State may tax a railroad company upon its gross receipts, in proportion to the number of miles run within the State, as a tax on its property; and may also lay a tax on these same gross receipts in proportion to the same number of miles, for the privilege of exercising its franchise in the State. I do not know what else it may not tax the gross receipts for. If the interstate commerce of the country is not, or will not be, handicapped by this course of decision, I do not understand the ordinary principles which govern human conduct." [47]

And earlier, in describing the situation resulting from the case and its predecessors, he had said:

"A corporation, according to this class of decisions, may be taxed several times over. It may be taxed for its charter; for its franchises; for the privilege of carrying on its business; it may be taxed on its capital, and it may be taxed on its property. Each of these taxations may be carried to the full amount of the property of the company. I do not know that jealousy of corporate institutions could be carried much further." [48]

This dissenting note of lament and sympathy deserves attention from those who love to insist that the Supreme Court has been overzealous in shielding corporations from their just burdens. Its interest for our immediate purpose, however, lies in its indication

[47] 142 U. S. 217, 235–236, 12 Sup. Ct. Rep. 121 (1891).

[48] *Ibid.*

of the possibility that what caused Mr. Justice Bradley most concern was the cumulation of taxes on the same economic interest, rather than the fact that interstate commerce did not escape entirely from giving sustenance to the states. It shows, too, the recognition that every tax may depend for its justification on the absence of certain other possible taxes. No just solution of the complex problem raised by alleged conflicts between state taxing power and the necessary freedom of interstate commerce can be reached if the state is not required to let its right hand know what its left hand doeth.

II

From the foregoing review it appears that for two decades the Supreme Court had been allowing states to impose taxes that from an economic standpoint were levied more or less directly on receipts from interstate commerce. In all this time, however, none of the opinions had indicated clearly that the court knew exactly what it was doing and was prepared to support its decisions by accurate and detailed analysis of the economics of the matter. The judges were engaged in the task of finding what subjects of taxation were interstate commerce itself, and what were something else. They assumed that a tax on a subject not itself interstate commerce could not be a regulation of that commerce; and they were prone to indulge in nominalism and conceptualism in finding what was the subject taxed. In *State Tax on Railway Gross Receipts* [49] and in *Osborne* v. *Mobile*,[50] they took positions that they later abandoned.[51] They seemed to be feeling their way in the dark. From 1894 on, however, the issues are more clearly recognized and more adequately discussed.

In *Cleveland, C., C. & St. L. R. Co.* v. *Backus*,[52] Mr. Justice Brewer leaves no doubt as to what the majority of the court think about the propriety of assessing railroad property so as to include the value of the interstate commerce in which the road is engaged. This case and a companion one[53] had to do with Indiana statutes

[49] Note 18, *supra*.

[50] 16 Wall. (U. S.) 479 (1872).

[51] The former in Philadelphia & Southern Mail S. S. Co. *v.* Pennsylvania, note 20, *supra;* the latter in Leloup *v.* Mobile, 127 U. S. 640, 8 Sup. Ct. Rep. 1380 (1888).

[52] 154 U. S. 439, 14 Sup. Ct. Rep. 1122 (1894).

[53] Pittsburgh, C. C. & St. L. Ry. Co. *v.* Backus, 154 U. S. 421, 14 Sup. Ct. Rep. 1114 (1894).

which, while not requiring the tax commissioners to assess railroad property on the basis of its earnings, clearly permitted them to do so. And it was quite evident that they had done so, for one road was valued at $6,000 per mile less than another, and the assessment of a previous year under the method then prevailing was nearly trebled under the new statute. The decision in the two cases is that value is a matter of fact for the assessors to determine, and that the court will not upset that determination unless it is fraudulent. But the opinion in the Cleveland case unequivocally approves of the position that the value in fact is what the road would sell for, that this depends on the earnings, and that therefore the earnings may and should be considered in estimating that value.

"The rule of property taxation," says Mr. Justice Brewer, "is that the value of the property is the basis of taxation." [54] "It does not mean," he adds, "a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon that value." [55] Then he states what value is:

"But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put." [56]

The opinion then goes on to say that "in the nature of things it is practically impossible — at least in respect to railroad property — to divide its value, and determine how much is caused by one use to which it is put and how much by another." [57] The learned justice asks whether an interstate bridge, the value of which depends entirely on interstate commerce, must "on that account be entirely relieved from the burden of state taxation." [58] He assumes two such bridges, one between two large centers of population and the other between two hamlets, and inquires whether they must be valued at the same amount, in spite of the fact that one is obviously worth much more than the other. "Will it be said that the taxation must be based simply on the cost, when never was it held

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[54] 154 U. S. 439, 445, 14 Sup. Ct. Rep. 1122 (1894).
[55] *Ibid.* [56] *Ibid.* [57] *Ibid.*
[58] *Ibid.*, 439, 446.

that the cost of a thing is the test of its value?"[59] It is a practical impossibility to "eliminate all of the value which flows from the use, and place the assessment at only the sum remaining."[60] There are only two alternatives. "Either the property must be declared wholly exempt from state taxation or taxed at its value, irrespective of the causes and uses which have brought about such value."[61]

Of course Mr. Justice Brewer's conclusion is not so ineluctable as he seems to think. The value for purposes of state taxation need not be the economic exchange value. While railroad property is merged in the business in which it is engaged, since it has no feasible alternative uses, this is not true of all property, and by resort to hypothesis a separation can be made of the value of the property of a railroad from that of the business which it serves. The fact that it may be difficult or impossible to express the results mathematically with any degree of accuracy does not prevent some compromise between the two alternatives which Mr. Justice Brewer regarded as the only ones conceivable. Such a compromise the court has been compelled to make time and again in finding "fair value" for purposes of rate regulation.[62] And the same compromise might have been made in finding value for purposes of taxation. When the court declines to do so, it is guided by considerations of policy, whether it is aware of the fact or not.

Mr. Justice Brewer plainly invokes considerations of policy when he declares:

"And the uniform ruling of this court, *a ruling demanded by the harmonious relations between the States and the national government*, has affirmed that the full discharge of no duty entrusted to the latter restrains the former from the exercise of the power of equal taxation upon all private property within its territorial limits. All that has been decided is that, beyond the taxation of property, . . . no state shall attempt to impose the added burden of a license or other tax for the privilege of using, constructing, or operating any bridge, or other instrumentality of interstate commerce, or for carrying on of such commerce."[63]

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[59] 154 U. S. 439, 446, 14 Sup. Ct. Rep. 1122 (1894).

[60] *Ibid.*

[61] *Ibid.*

[62] See Robert L. Hale, "The Supreme Court's Ambiguous Use of 'Value' in Rate Cases," 18 COL. L. REV. 208.

[63] 154 U. S. 439, 446, 14 Sup. Ct. Rep. 1122 (1894).

Here the position seems to be that what the commerce clause inhibits is the cumulation of taxes on interstate commerce. But the cumulation denounced does not include taxes on the franchise to be a corporation or to employ corporate powers in local business. Whether taxes on such privileges may be imposed in addition to taxes on property is left uncertain. But there is no uncertainty as to the elements that may be considered in assessing property:

"It is enough for the State that it finds within its borders property which is of a certain value. What has caused that value is immaterial. It is protected by state laws, and the rule of all property taxation is the rule of value, and by that rule property engaged in interstate commerce is controlled the same as property engaged in commerce within the State." [64]

This, of course, is because the court chooses to have it so. The wisdom of their choice is not here disputed. But the effort to show that the choice does not result in burdening interstate commerce cannot receive the same approval. It is difficult to agree that the assessment of property by reference to the earnings of the business to which the property is devoted is not "an attempt to do by indirection what cannot be done directly — that is, to cast a burden on interstate commerce." [65] An accountant would hardly be satisfied with the argument that "it comes rather within that large class of state action, like certain police restraints, which, while indirectly affecting, cannot be considered as a regulation of interstate commerce, or a direct burden on its free exercise." [66] Even a rhetorician might find the argument a concession that the state may do indirectly what it is forbidden to do directly. If we are interested primarily in what happens, and only secondarily in what words are used to justify or condemn it, we observe little, if any, difference between a tax on receipts and a tax on property assessed on a basis of receipts. When a court holds that taxes on property may be measured by receipts from interstate commerce or a capitalization thereof, it allows a state to regulate interstate commerce, no matter what name may be affixed to the state action. In any factual sense, this regulation is still a regulation even though it is

[64] 154 U. S. 439, 446–47, 14 Sup. Ct. Rep. 1122 (1894).
[65] *Ibid.*, 439, 447.
[66] *Ibid.*

abundantly justified by the demands of the "harmonious relations between the states and the national government."

The dissent in these two Indiana cases added nothing to what Mr. Justice Bradley had said in the Pullman case. Justices Bradley and Lamar were no longer on the bench. Only Justices Harlan and Brown remained of those who had disapproved of the Pullman case. They dissent also in the Indiana cases, Mr. Justice Harlan writing a brief opinion devoted chiefly to the contention that Indiana had taxed property which had no situs there. He insists that "the board had no authority to impart to the value of railroad track and rolling stock, within the State, any part of the company's various interests and property without the State." [67] With this the majority do not disagree. They deny that the state has done so. They say that the value of the property within the state is enhanced by the fact that it is used in connection with other property without the state. "Each state," says Mr. Justice Brewer, "is entitled to consider as within its territorial jurisdiction and subject to the burdens of its taxes what may perhaps not inaccurately be described as the proportionate share of the value flowing from the operation of the entire mileage as a single continuous road." [68] This he treats as a question distinct from that of whether receipts may be used as a test of the value of property. To this latter question Mr. Justice Harlan devotes no argument, although the general language of his opinion indicates disagreement on this point as well as on the one that he specifically discusses.

Two years later in *Western Union Telegraph Co.* v. *Taggart* [69] the doctrine of the Indiana cases was re-affirmed by an undivided court. The opinion of Mr. Justice Gray consists largely of quotations from previous opinions. It says that "the cost of the property, or of its replacement, is by no means a true measure of its value," [70] and adds that previous authorities have established that the commissioners had the right and the duty, in estimating the value of the property within the state, to take into consideration the franchises granted to the company by sister states, the United States and foreign countries. Plainly a valuation of property by reference

[67] 154 U. S. 421, 438, 14 Sup. Ct. Rep. 1114 (1894).
[68] 154 U. S. 439, 444, 14 Sup. Ct. Rep. 1122 (1894).
[69] 163 U. S. 1, 16 Sup. Ct. Rep. 1054 (1896).
[70] *Ibid.*, 1, 28.

to its earnings includes the value of all the franchises that help to make the earnings possible.

It now seemed to be firmly established that the state could tax receipts from interstate commerce, provided it did so by using those receipts as a measure of the value of property. But the battle royal was yet to come. Before considering the next phase, however, mention should be made of two decisions which have a bearing on later developments. Both were rendered in 1895. *Erie Railroad* v. *Pennsylvania*[71] allowed a state to tax a railroad on tolls received from other carriers for the use of its line, even though the lessee carrier used the road largely for interstate commerce. The tax was directly on the tolls, but the court held in substance that the tolls were received as rent and not for carriage, and cited for the constitutionality of the exaction the Maine case, the Indiana cases, and *Postal Telegraph Co.* v. *Adams*,[72] decided four months earlier.

The Postal case sustained a tax on an interstate telegraph company assessed at one dollar for each mile of line, which tax was in lieu of all other state, county, and municipal taxes. The company insisted, and Justices Brewer and Harlan agreed with it, that the tax was on the privilege of doing business, and was therefore void as a regulation of interstate commerce and an interference with a federal instrumentality. But the majority of the court thought that the tax, though called a privilege tax, was in substance one on property, and as such was free from fault. "In marking the distinction between the power over commerce and municipal power," observed Chief Justice Fuller, "literal adherence to particular nomenclature should not be allowed to control construction in arriving at the true intention and effect of state legislation." [73] Since the charge, though in the form of a franchise tax, was "arrived at with reference to the value of its property within the State and in lieu of all other taxes," [74] it was held not to amount to a regulation of interstate commerce. This case did not involve taxes measured by receipts and is therefore not pertinent to the problem of valuation. Its relevancy to the present discussion lies in its indication that taxes in lieu of property taxes will receive the

[71] 158 U. S. 431, 15 Sup. Ct. Rep. 896 (1895). Mr. Justice Harlan alone dissented.
[72] 155 U. S. 688, 15 Sup. Ct. Rep. 268 (1895).
[73] *Ibid.*, 688, 700.
[74] *Ibid.*

same consideration that is bestowed on taxes directly on property, and that the validity or invalidity of any particular tax complained of may be dependent on the rôle it plays in the entire fiscal system of the state.

III

In all but one of the cases thus far considered, the property which has been regarded as the subject of taxation consisted of railroad, telephone or telegraph lines and their accoutrements. By far the greater part of such property is indissolubly annexed to the business in which it is engaged. This is true even of the rolling stock of a railroad, if we have in mind the railroad business in its entirety. Nevertheless a practical distinction immediately suggests itself between valuing the tangible property of telephone and telegraph companies on the basis of income, and applying the same rule to the cars of the Pullman Company. If the Pullman company sold its business, but retained its cars, the cars would not become valueless. Undoubtedly they would be worth less than their reproduction cost, if we assume that they have no market as ministers to luxury. They would fall in value to the cost of the less gaudy and expensive coaches which carry the multitude. But the right of way and tracks of a railroad, and the equipment of telegraph and telephone companies would suffer far more from being disassociated from the business which they serve. There is a genuine practical difficulty in valuing this species of property divorced from the profitableness of the uses to which it is put — a difficulty immeasurably greater than that presented by the carriages of the Pullman company.[75] This difference, however, was overlooked by the

[75] In Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138, 18 Sup. Ct. Rep. 808 (1898) the Supreme Court had comparatively little difficulty in fixing a rule for the valuation of palace cars which excluded from consideration all elements of value derived from the receipts of the business in which they were used. This case was a suit to recover the value of property delivered under an *ultra vires* contract. The court was urged to consider the market value of the shares of the transferring corporation in determining the value of the property transferred, but it refused to do so, Mr. Justice Peckham declaring: "The market price of the shares of stock in a manufacturing corporation includes more than the mere value of the property owned by it, and whatever is included in that price beyond and outside of the value of its property is a factor which in a case like this cannot be taken into consideration in determining the liability of the cross defendant. . . . The probable prospective capacity for earnings also enters largely into market value, and

minority as well as the majority in *Pullman's Palace Car Co.* v. *Pennsylvania*,[76] in which attention was fixed almost exclusively on the question whether the cars had a taxable situs in the state.

In *Adams Express Co.* v. *Ohio State Auditor*,[77] however, the matter was more fully threshed out. This case sustained Ohio's application of the unit rule to the taxation of interstate express companies. The real estate of these companies was separately appraised, and this appraised value was deducted from the assessment of the company's "entire property" within the state. The statute set forth no explicit instructions for the appraisal of this "entire property," but the companies were required to report the value of their total capital stock, their entire gross receipts, their gross receipts from business done in Ohio, and the length of the lines of rail and water routes over which they did business in Ohio and elsewhere. From this and other data the board was to "arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said company, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid." [78] For the most accurate statement of what the board did we must go to the brief of Mr. Maxwell in behalf of the companies:

". . . it is manifest that what the board did . . . was not to assess the defendants on the basis of the market value of such of their tangible property as was found within the State of Ohio, and on their moneys and credits within the State, but to treat the companies as owning dividend producing plants, whose value is represented by the market value of their shares, and to assign a portion of that value to the State of Ohio, as being property subject to taxation in that State. The basis of apportionment

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future possible earnings again depend to a great extent upon the skill with which the affairs of the company may be managed. These considerations, while they may enhance the value of the shares in the market, yet do not in fact increase the value of the actual property itself. . . . We must therefore take the property that actually was transferred and determine its value in some other way than by this resort to the market price of the stock" (pages 154–56).

It should be noted that a year before this opinion was rendered, the court had forsaken the notion that these state taxes measured by the unit rule were imposed on tangible property alone, and had announced the doctrine that it was the intangible property of the company that was thus being valued.

[76] Note 33, *supra*.

[77] 165 U. S. 194, 17 Sup. Ct. Rep. 305 (1897).

[78] *Ibid.*, 194, 197.

made by the board to Ohio is not disclosed; it was evidently hap-hazard and arbitrary." [79]

Or, as was argued later, "the assessments, while purporting to be upon the property of the plaintiffs within the State, are, in fact, levied upon the plaintiffs' business (which is largely interstate commerce), by placing a fictitious and artificial value upon that property." [80] The result was that wagons, horses, pouches, etc., which one of the companies valued at $23,400, were assessed at $499,377.60, if that was the property being taxed.

It is difficult to escape from the characterizations of the tax presented in the briefs against its constitutionality. Certainly the value of the horses, wagons, etc., "would be precisely the same" and they "could be bought for the same price — be sold for the same price — be produced and reproduced for the same price — whether the capital stock of the company was 50 per cent below par or 100 per cent above par." [81] It is true also that "under this method of valuation, whether the horses were lame or sound, or old or young, whether the wagons and harness were old or new, was of little consequence." [82] Nor does there seem any valid answer to the position that:

"To say that this sort of detached and fugitive property, simply because it is employed in the business of an organized express company, is unit property, like a railroad or a telegraph, is only another way of attempting to justify an assessment against the business of a company, under the pretense of assessing its property." [83]

As the brief of Mr. James C. Carter puts it: "The property which, according to the notion under criticism, is taxed, is a pure abstraction having no situs, no existence, even, save in intellectual conception, something which can nowhere be seen or handled or made the subject of action." [84] Later Mr. Carter enumerates the elements which determine the market value of the shares, and contends that a tax on those elements is a tax on the occupation itself.

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[79] 165 U. S. 194, 204–05, 41 L. Ed. 686–687 (1897).

[80] *Ibid.*, 194, 205, *Ibid.*, 687.

[81] *Ibid.*, 194, 215, *Ibid.*, 692.

[82] *Ibid.*

[83] 41 L. Ed. 687 (1897). This excerpt is not contained in the abstract of Mr. Maxwell's brief given in the official reports.

[84] 41 L. Ed. 693 (1897). Not in the official reports.

These contentions of attorneys for the companies seem incontrovertible. Any realistic approach to the genuine issue must concede their validity. If such a tax is to be sustained, it must be because the states *can* tax interstate commerce, provided they do it in approved ways. But the majority position seems poetical rather than realistic. "Doubtless there is a distinction," says Chief Justice Fuller, "between the property of railroad and telegraph companies and that of express companies." [85] The learned justice recognizes that "the physical unity existing in the former is lacking in the latter"; but he discounts the importance of this difference by saying that "there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use." [86] After pointing out that "the cars of the Pullman Company did not constitute a physical unity, and their value as separate cars did not bear a direct relation to the valuation which was sustained in that case," [87] he continues:

"No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons and furniture, than that of railroad, telegraph and sleeping car companies, to roadbed, rails and ties, poles and wires, or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches and furniture, the contracts for transportation facilities, the capital necessary to carry on the business, whether represented in tangible or intangible property, in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others." [88]

That such value exists is clear. Whether it should rightfully be recognized as a basis for the assessment of state taxes is a question of policy. No criticism is here directed against the judgment that "the States through which the companies operate ought not to be compelled to content themselves with a valuation of separate pieces of property disconnected from the plant as an entirety, to the proportionate part of which they extend protection, and to the dividends of whose owners their citizens contribute." [89] But when

[85] 165 U. S. 194, 221, 17 Sup. Ct. Rep. 305 (1897).
[86] *Ibid.* [87] *Ibid.*
[88] *Ibid.*
[89] *Ibid.*, 194, 227.

it is insisted that "the taxation is essentially a property tax, and, as such, not an interference with interstate commerce," [90] the matter is not so clear. This value which the items have in combination and from their use is mainly the value of the combination and the use, and in small part that of the items. And the combination and the use are largely in interstate commerce. The dividends to which Ohio citizens contribute are dividends from interstate as well as intra-state business. The tax is a tax on interstate commerce, and we shall not escape confusion until we recognize it.

The dissenting opinion of Mr. Justice White recognizes the point, but does not dwell upon it. Attention is devoted chiefly to the contention that the tax is on elements of value not located in the state. It is rightly asserted that extra-state values were taken account of in making the assessment. From this is drawn the following conclusion:

"I reiterate, therefore, that the rule which recognizes that for the purpose of assessing tangible property in one State you may take its full worth and then add to the value of such property a proportion of the total capital stock, is a rule whereby it is announced that the sum of all the property, or an arbitrary part thereof, situated in other States, may be joined to the valuation of property in one State for the purpose of increasing the taxation within that State." [91]

This sentence, isolated from its context, has the vice of not recognizing that values in the taxing state were included in the total, and that the total was then divided in proportions according to a plan that assumed to allocate to the taxing state only that part which rightfully belonged to it. The state certainly adds something to the value of the tangible property within the state, but it does not necessarily add extra-state elements by pooling all values in all the states, and then dipping out the portion which it regards as the contribution of the taxing state. It is by neglecting the division which follows the addition that Mr. Justice White is convinced that "it cannot be said that this vast excess does not embrace property situated outside of Ohio, when both the text of the statute of that State and such text as expounded by the Supreme Court of the State clearly show that the sum of the excess is arrived

[90] 165 U. S. 194, 226, 17 Sup. Ct. Rep. 305 (1897).

[91] *Ibid.*, 194, 240–41.

at by adding to the property in the State the value of property situated outside thereof." [92]

This neglect, however, is logically legitimatized in Mr. Justice White's opinion, because of his insistence that the tangible property of the express companies in Ohio is not part of anything that can be regarded as a unit. If what you add from without the state is unrelated to what you are taxing within the state, the subsequent division, though it may lessen, does not obliterate the evil. The soundness of the dissenting position that Ohio is taxing values in other jurisdictions depends upon the assumption that the Ohio property of express companies is not part of a unit, or upon the fact that more of the whole is assigned to Ohio than rightly belongs to it. Both positions are relied on by the minority. With the second we are not here concerned.[93] The majority recognize fully that there may be an unjustifiable apportionment which serves to draw to Ohio values domesticated elsewhere. Certain kinds of property are not distributable. But the existence of such property, they say, is not to be assumed. "It is for the companies to present any special circumstances which may exist, and, failing their doing so, the presumption is that all their property is directly devoted to their business, which being so, a fair distribution of its aggregate value would be upon the mileage basis." [94] The majority opinion concludes by saying:

"We have said nothing in relation to the contention that these valuations were excessive. The method of appraisement prescribed by the law was pursued and there were no specific charges of fraud. The general rule is well settled that 'whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined.'" [95]

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[92] 165 U. S. 194, 248, 17 Sup. Ct. Rep. 305 (1897).

[93] This is considered in 31 HARV. L. REV. 772–75. For cases requiring the state to amend the apportionment of interstate values, see Fargo *v.* Hart, 193 U. S. 490, 24 Sup. Ct. Rep. 498 (1904); Louisville & N. R. Co. *v.* Greene, 244 U. S. 522, 37 Sup. Ct. Rep. 683 (1917), and Illinois Central R. Co. *v.* Greene, 244 U. S. 555, 37 Sup. Ct. Rep. 697 (1917).

[94] 165 U. S. 194, 227, 17 Sup. Ct. Rep. 305 (1897).

[95] *Ibid.*, 194, 229.

The major issue in the case was the propriety of the rule of assessment prescribed, rather than the correctness of the particular application. The validity of the rule depends upon a judgment as to the rightfulness of ever including earnings from interstate commerce in assessments for state taxation and upon the subordinate inquiry whether the unit rule is suitable to the property of express companies. The first inquiry had been answered in prior decisions. The second only was novel, and that was novel in form rather than in substance.

Whether the horses and wagons of an express company are integral parts of a larger unit depends upon whether you like to think of them that way. Mr. Justice White does not. "What unity can there be," he asks, "between the horses and wagons of an express company in Ohio with those belonging to the same company situated in the State of New York?" [96] To this, the majority reply that there is a unity of use and management. To the writer, the answer seems a bit of deceptive word painting. Mr. Justice White says that it "in reality declares that a mere metaphysical or intellectual relation between property situated in one State and property found in another creates as between such property a close relation for the purpose of taxation." [97] Though he dislikes the application of the unit rule to railroad and telegraph property, he holds that it "is necessarily predicated upon the physical connection of such property," [98] and insists that it cannot be extended to situations where the unity is not physical. He denies that the cars of the Pullman Company were regarded as items in a unit, and contends that the issue with respect to them was solely whether they had a taxable situs in Pennsylvania, and that the statement that the method of assessment applied to them was "just and equitable" was made "with reference to the facts held to exist in the case before the court." [99] On those particular facts, he finds that the tax in that case was not excessive.

The discussion of "relations," physical and metaphysical, might easily carry us to realms where flight for a lawyer is precarious. A physicist would hardly abandon the search for a continuum as soon as he lost the nexus of iron rails. We are told by many meta-

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[96] 165 U. S. 194, 250, 17 Sup. Ct. Rep. 305 (1897).
[97] *Ibid.* [98] *Ibid.* [99] *Ibid.*

physicians that all relations are intellectual. Whether any posited unity is imaginary or real can provoke endless debate. But these alluring problems can be dismissed as not germane to the present controversy. Since any application of the unit rule which uses as a base the value of total capital stock necessarily imposes taxation on a capitalization of earnings, it seems futile to argue whether a unity of "use and management" differs from a physical unity. The fact that the tangible property of the express companies in Ohio had an independent, easily assessable value makes it less easy to conceal the fact that the express business was being taxed. But the disguise seems apparent enough in the case of railroads and telegraphs. There is no denying that part of Mr. Justice White's opinion which says that it cannot be "contended that the tax here involved is not a tax on interstate commerce, in view of the fact that, from the nature of the criteria of value adopted, an aliquot part of the avails and receipts of the company of every kind is added to the taxing value in the State of Ohio." [100] There is but one answer to the query he propounds:

"How, I submit, can it now be announced that there is an imaginary unity between personal property widely separated because that property has a common owner, without, at the same time, reversing the settled adjudications of this court on the subject of the power of a State to tax the earnings from interstate commerce?" [101]

The answer is that the taxing of such earnings is accomplished in a different way from the ways previously declared unconstitutional. Whether the difference makes a difference is another question. The court's way out of such difficulties is to distinguish between direct and indirect burdens on interstate commerce. But such distinctions have to be fortified by something more than affixing labels. Not infrequently the labels are masks for changed views of policy. Yet in many cases they express substantial differences of effect. Whether they do in the present instance will be considered later.

The opinion of Chief Justice Fuller hardly touches the question. But the case did not end here. The attorneys for the companies presented a petition for a rehearing, fortified by elaborate argu-

[100] 165 U. S. 194, 248–49, 17 Sup. Ct. Rep. 305 (1897).

[101] *Ibid.*, 194, 251–52.

ment. They concede the propriety of assessing railroad, telephone and telegraph companies by the unit rule, for the reason that there is no other feasible method of finding the value of property of this nature. But horses and wagons, they say, have an easily ascertainable pecuniary value. They are worth no more to an express company than to anyone else. It is improper to impute to them the earnings of the business in which they are used, for they might be dispensed with and the earnings still continue. By hiring others to care for local deliveries, and by renting furniture, etc., instead of owning it, the express companies might divest themselves of all that Ohio purported to tax, and could still carry on the business with substantially equal success. The small amount of the tangible property in Ohio contributes almost nothing to the values which Ohio has assessed against it.[102]

To this, Mr. Justice Brewer, in denying the motion for a re-argument,[103] answers that what Ohio was taxing was not alone the tangible property of the company in Ohio, but the intangible as well.[104] He does not appear to insist that the Ohio legislature

[102] The petition for a rehearing is printed, apparently in full, in 166 U. S. 185, 186–217 and 41 L. Ed. 966–76.

[103] Adams Express Co. *v.* Ohio State Auditor, 166 U. S. 185, 17 Sup. Ct. Rep. 604 (1897).

[104] Mr. Justice Miller had previously regarded taxes assessed by the unit rule as taxes on intangible property in State Railroad Tax Cases, note 23, *supra*. See page 238, 239, *supra*. In these cases, however, the interstate commerce question was not raised. On the same day that the opinion denying a rehearing in the Adams Express case was handed down, the court rendered two other decisions involving the same point.

Adams Express Co. *v.* Kentucky, 166 U. S. 171, 17 Sup. Ct. Rep. 527 (1897) sustained what purported to be a tax on the franchises of the company, measured in the same way as the Ohio taxes. Since the Adams Express Co. was a joint-stock company without any corporate franchise, the minority contended that, even if the doctrine of the Ohio cases were accepted, it did not apply here, because the only franchise that could be conceived of as the subject of taxation was one to be inferred from the proposition that the right to do interstate commerce in Kentucky resulted from the assent of the state, and that such a proposition was obviously opposed to the settled course of decision. Some reliance, too, was placed on the fact that the Ohio tax was at the rate of $250 per mile while the Kentucky tax was at the rate of $764 per mile. The majority, however, called the tax in effect one on intangible property, Chief Justice Fuller observing: "We agree with the Circuit Court that it is evident that the word 'franchise' was not employed in a technical sense, and that the legislative intention is plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and all foreign and domestic companies possessing no franchise, should be valued as an entirety, the value of the tangible property be deducted, and the value

realized the fact. The point is introduced by saying that the argument on behalf of the companies that their horses, wagons, etc., constitute their only property in Ohio "practically ignores the existence of intangible property, or at least denies its liability for taxation." [105] "To ignore this intangible property," continues the opinion, "or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country." [106] The learned justice points out the existence of an excess of value over that of tangible property, and asks: "What gives this excess of value?" [107] The answer is that it is "obviously the franchises, the privileges the company possesses — its intangible property." [108]

This is not to be quarreled with, but what perplexes is the task of reconciling this with the earlier statement that "no state can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce." [109] What Mr. Justice Brewer seems to regard as a resolution of the difficulty seems to the writer nothing but a contradiction of the earlier statement. That statement was given as the repeated affirmation of the court. It is followed by the sentence: "And it has as often been affirmed that such restriction on the power of a State to interfere with interstate commerce does not in the least abridge the right of a State to tax at

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of the intangible property thus ascertained . . . should be assessed on the basis of their lines within and without the State." (166 U. S. 150, 180.)

Henderson Bridge Co. *v.* Kentucky, 166 U. S. 150, 17 Sup. Ct. Rep. 532 (1897), sustained a similar tax on that part of the intangible property of a company owning an interstate bridge which was deemed to be within Kentucky. Chief Justice Fuller declared that the tax clearly was not on the interstate business carried on over the bridge, because the bridge company did not transact any such business, it being carried on by others who paid tolls for the use of the bridge, thus bringing the case within Erie Railroad *v.* Pennsylvania, note 71, *supra*. Mr. Justice White distinguished the Erie case because the railroad there involved lay wholly within the limits of a single state. The pith of his dissent is as follows: "It being beyond dispute, therefore, that the sum of taxation in this case was fixed almost exclusively by the gross earnings from interstate commerce, who, may I ask, can point out the distinction between taxing the gross earnings derived from interstate commerce and taxing a valuation based on such earnings?" (166 U. S. 150, 165).

The division of opinion in these two cases was the same as that in the Ohio cases.

[105] 166 U. S. 185, 218, 17 Sup. Ct. Rep. 604 (1897.)

[106] *Ibid.*, 185, 219.

[107] *Ibid.*, 185, 220.

[108] *Ibid.*

[109] *Ibid.*, 185, 218.

their full value all the instrumentalities used for such commerce." [110] The contradiction plainly appears when it is said that intangible property is taxable and that "it matters not in what this intangible property consists — whether privileges, corporate franchises, contracts or obligations." [111]

The rest of Mr. Justice Brewer's opinion consists of forceful argument why this intangible property should be taxed for what it is actually worth. "Substance of right demands that whatever be the real value of any property, that value may be accepted by the State for the purpose of taxation, and this ought not to be evaded by any mere confusion of words." [112] Accumulated wealth, it is said, will laugh at the crudity of tax laws which reach only tangible property and ignore that which is intangible.[113] After pointing out that the tangible property of the Adams Express Company was valued at about $4,000,000, while its stock would sell for over $16,000,000, Mr. Justice Brewer continues:

"But what a mockery of substantial justice it would be for a corporation, whose property is worth to its stockholders for the purpose of income and sale $16,800,000, to be adjudged liable for taxation upon only one fourth of that amount. The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for purposes of sale." [114]

With this let us cordially agree. Ohio was not venturing into moonshine or dreamland to find the value which it taxed. If its method of apportionment was just, it was not venturing outside of Ohio.[115] But its excursion into the realm of the intangible was an

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[110] 166 U. S. 185, 218, 17 Sup. Ct. Rep. 604 (1897).

[111] *Ibid.*, 185, 219.

[112] *Ibid.*, 185, 221.

[113] *Ibid.*

[114] *Ibid.*, 185, 222.

[115] On the situs of this property without location, Mr. Justice Brewer said: "Where is the situs of this intangible property? Is it simply where the home office is, where is found the central directing thought which controls the workings of the great machine, or in the State which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter. . . . But the franchise to be is only one of the franchises of a corporation. The franchise to do is an independent franchise, or rather a combina-

entry into the field of interstate commerce, and the Supreme Court would have done well to recognize it more frankly and to find a way to justify it that breathed none of the atmosphere of that moonshine and dreamland which is referred to as the bourne in which business men do not invest.

Such justification is by no means difficult. The brief of Mr. Carter on behalf of the express companies gave the court a clue to the most solid of reasons for sustaining the tax which that brief condemned. For Mr. Carter was a jurist as well as an advocate. And in the present instance he analyzed the problem for us most helpfully. The basis for the general doctrine of the immunity of interstate commerce from state taxation, he states as follows:

"There is no constitutional provision in terms forbidding the States to impose burdens by way of taxation upon interstate commerce. The prohibition is a necessary implication arising from the fact that the subject-matter is one placed exclusively under the sovereign control of Congress, and the imposition of burdens upon it by the States, whether by taxation or otherwise, would be a denial of that sovereignty and false assumption by the States of a power over it, which, if it existed, might be so exercised as to destroy it." [116]

And then he adds the significant qualification:

"There is one necessary exception to the rule that the States cannot tax interstate commerce. Inasmuch as the existence of the States is necessary to the existence of interstate commerce, that ordinary system of taxation which is necessary to the existence of the States, namely, taxation upon all property within them, must be permitted, and the property employed in interstate commerce is not to be exempted. This exception is, indeed, rather apparent than real; for where no burden can be put upon property employed in interstate commerce without being at the same time put upon all other property, interstate commerce is not really burdened. Were it not subject to taxation in this form the effect would be to confer upon it an affirmative advantage equivalent to a pecuniary bounty equal to the amount of the tax from which it is exempted." [117]

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tion of franchises, embracing all things which the corporation is given power to do, and this power to do is as much a thing of value and a part of the intangible property of the corporation as the franchise to be. Franchises to do go wherever the work is done." (166 U. S. 185, 223–24).

[116] 165 U. S. 194, 217, 41 L. Ed. 694 (1897.)

[117] *Ibid.*, 194, 217–18.

Manifestly, what is true of property used in interstate commerce is equally true of business that is interstate commerce. If such business is exempted from burdens which local business has to bear, it is thereby given a bounty to the extent of the exemption. Mr. Carter's point is that a tax is not a burden on interstate commerce unless it discriminates against that commerce. It would probably be safer to say that such burden on interstate commerce as non-discriminatory taxation may impose is not sufficiently serious to be accounted a regulation. Such taxation is forbidden by no explicit language in the Constitution. The exemption of interstate commerce from state taxation arises by implication only, and the implication should not be carried to the point of compelling the states to confer positive benefits on interstate commerce by discriminations in its favor.

Mr. Carter apparently appreciated the applicability of his concession to taxes on business, for he hastens to add that "a tax in any other form [than a tax on property] cannot be thus equalized over all private interests, and, if allowed, would be, or might easily be made to be, an especial burden." [118] Here is the crucial difficulty in the problem. In Ohio, express companies were taxed on the basis of their income-producing capacities, while many other businesses were assessed on a less onerous basis. Was there not therefore necessarily a discrimination against the express companies and the interstate commerce which they carried on? In one sense, of course, there is always discrimination, wherever there is difference of treatment. The requirement of absolute uniformity is, however, utterly impracticable. The rule of "reasonable classification" which the court has been compelled to adopt in applying the equal-protection clause [119] seems necessary also in passing upon issues of alleged discrimination raised under other constitutional clauses. But the Express cases were wisely decided only if they can be brought within the rule of reasonable classification.

The theories of both the majority and the minority avoided explicit analysis of this element in the situation. Chief Justice Fuller quoted a portion of the opinion of the state court which made the point that the earning capacity of real estate determines its assessable

[118] 165 U. S. 194, 218, 41 L. Ed. 694 (1897).

[119] See Missouri *v.* Lewis, 101 U. S. 22 (1879).

value.[120] But the tax in question was not on the real estate of the express companies, for that was assessed separately, and the assessment then deducted from the value of the "total property" determined by the use of the unit rule. Mr. Justice White's dissenting opinion touches upon what ought to be the determining element in the case, when it points out that if the unit rule is good for express companies, it ought also to be applied to bankers and merchants. But this is adduced in support of the contention that the tax is not confined to tangible property within the state but falls also on all kinds of property without the state. That the assessment on the express companies greatly exceeded "the true value in money" of their tangible chattels within the state was fully recognized in the opinion denying a rehearing, in which this excess was called the intangible property of the company. What should then have been discussed was the question whether the intangible property of the express companies was taxed no more heavily than that of others.

The answer to the question depends upon whether similar business taxes were imposed on other businesses. Only by a general state-wide income tax can differences of treatment be avoided. And Ohio had no general income tax. Certainly the intangibles of the express companies were discriminated against in favor of intangibles enjoyed by many other businesses. But the doctrine of reasonable classification ought to go far enough to say that it is not necessary to treat express companies in the same way as other businesses that come into no competition with them. It can hardly be called a discrimination against interstate commerce to tax express companies more heavily than farmers. On the other hand, express companies may suffer if merchants escape what they must endure. An increase in the cost of interstate transportation by taxation of express companies may well reduce the volume of that kind of interstate commerce to the resulting increase of sales over the counters of local merchants. The Ohio tax on express companies might discriminate against interstate commerce even though similar taxes were imposed on all engaged in any form of transportation, intra-state or interstate. But the court was excused from considering these possibilities in dealing with the Ohio cases, since they were not specifically pressed and supported by evidence.

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[120] 165 U. S. 194, 225, 17 Sup. Ct. Rep. 305 (1897).

It may well insist that the complainants are under the same burden to establish the existence of discrimination as to show flaws in the rule of apportionment. But it does not appear that the materiality of the point was recognized.

This of course does not establish that the cases were unwisely decided. A court cannot insist on an ideal system of state taxation, if such a thing can exist outside the minds of the doctrinaire. A rough approximation to fair treatment of interstate commerce is all that can reasonably be required. It does not appear that the interstate business of express companies was in any way discriminated against in favor of any direct competitor engaged solely in local carriage. Such discrimination against interstate commerce as the entire taxing system of the state may have resulted in, was probably remote, indirect, and practically negligible. The Ohio taxes and others like them seem to have spared the express companies and their interstate business for other foes to devour. What Mr. Justice Brewer has to say about the possibility that the decision may open the door to injustice through the conflicting action of different states applies as well to the possibility that Ohio had laid a heavier hand on some interstate commerce than on some that was local. "Such possibilities," he says, "do not equal the wrong which sustaining the contention of the appellant would at once do." [121] Fine spun theories about possible discrimination may be dismissed in the same way that Mr. Justice Brewer deals with what he calls fine spun theories about situs in the paragraph with which he closed his opinion:

"In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no fine spun theories about situs should interfere to enable these large corporations, whose business is carried on through many States, to escape from bearing in each State such burden of taxation as a fair distribution of the actual value of their property among those States requires." [122]

But a practical age demands not only practical decisions but practical opinions to support them. The distinction between the intangible property of an interstate carrier and its franchises and business and receipts is that the intangible property, as Mr. Justice

[121] 166 U. S. 185, 225, 17 Sup. Ct. Rep. 604 (1897). [122] *Ibid.*

Brewer estimates it, is a conception that embraces the economic value of all the elements from which it is distinguished. For all his professed practicality, Mr. Justice Brewer reaches his goal by arbitrary categories and by distinctions in nomenclature which are not distinctions in reality. In escaping from the difficulties inherent in the notion that chattels are necessarily worth a capitalization of what may be earned by their use, even though they are easily divorced from that use and though substitutes for the use are readily available, the learned justice gets into new difficulties by insisting that a tax on the value of an interstate business is any the less a tax on that business because it is called a tax on intangible property. Had the Supreme Court recognized the Ohio tax on express companies for what it really was, and held that Ohio could not apply this method of assessment to any interstate business unless it also applied similar methods to all other businesses, we might not have had to wait so long for the beginnings of the fiscal reform that disregards intangibles as a subject of taxation and looks to income as the best expression of the values thus disregarded, and therefore as the most satisfactory and equitable subject from which to derive the necessary funds for governmental purposes.

(*To be continued.*)

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